SUPREME COURT, U. S.

MAR 28 1969

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS' Co., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee Peter Kiewit Sons' Co. to Dismiss or Affirm.

HENRY F. WALKER,
615 South Flower Street,
Suite 806,
Los Angeles, Calif. 90017,
(213) 628-4241,

and

WAYNE VEATCH,
ROBERT C. CARLSON,
ROBERT P. DORSEY,
FREDERICK C. QUIMBY, JR.,
3200 Wilshire Boulevard,
Suite 510,
Los Angeles, Calif. 90005,
(213) 381-2861,

Counsel for Appellee, Peter Kiewit Sons' Co., a corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee Peter Kiewit Sons' Co. to Dismiss or Affirm.

Appellee, Peter Kiewit Sons' Co., a corporation, hereafter referred to as Kiewit, moves: (a) pursuant to Rule 16 (1)(b) to dismiss the appeal as to Kiewit on the ground that it does not present a substantial federal question insofar as relates to said appellee; (b) pursuant to Rule 16 (1)(b) to dismiss the appeal as to Kiewit on the ground that the judgment rests on an adequate non-federal basis insofar as relates to said appellee; (c) pursuant to Rule 16 (1)(d) to dismiss the appeal or to affirm the judgment on the ground that appellee Kiewit, contractor in construction of the freeway for the State of California, is neither liable nor

constitutionally required to be liable to appellants for claimed inverse condemnation; and (d) pursuant to Rule 16 (1)(d) to dismiss the appeal or to affirm the judgment on the ground that appellants failed to docket their appeal within ninety days from the denial of their Petition for Hearing by the California Supreme Court in accordance with the provisions of Rule 13 of this Court.

Statement.

The State of California, through its Department of Public Works, determined to construct a freeway. Appellants are homeowners whose properties were not taken but were in proximity to the freeway. Appellee Kiewit was the contractor engaged by the State in the construction of the freeway running in proximity to appellants' properties.

The Jurisdictional Statement (JS) of appellants states on page 2:

> "This is an inverse condemnation action, seeking compensation for damages, including physical damage, to Appellants' homes and for deprivation of the use and enjoyment of their property. Such action may be brought in California directly under the authority of Art. 1, §14, and Art. 20, §6, of the State Constitution, and requires no statutory authorization. *Rose v. State of California* (1942), 19 Cal.2d 713, 123 P.2d 505."

Appellants also state (JS pp. 4-5):

> ". . . Appellees are the State of California acting through its Department of Public Works (hereafter State) and Peter Kiewit Sons' Co. (hereafter Kiewit), the State's contractor.
>
> "Stated concisely, the instant action is one in inverse condemnation, whereby Homeowners seek

to recover compensation for damages inflicted by the State's and Kiewit's construction and operation of a freeway in proximity to Appellants' homes."

As observed by the California Court of Appeal (JS A-1):

"The state, by and through the Department of Public Works, installed the freeway; Peter Kiewit Sons' Company was the contractor under contract with the state."

Appellants do not and cannot claim that California lacks authority to construct freeways. Neither do they claim that California could not engage appellee Kiewit for the purposes of constructing the freeway nor that said appellee was not properly engaged by California.[1]

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[1]Appellants' pleading before the Court is their third amended complaint. [C.T. 89-95.] In paragraph five, appellants alleged that, in 1963, defendants commenced construction of the San Gabriel River Freeway in the vicinity of appellants' homes and that, on or about September 20, 1965, said freeway was completed and is now in operation. (Judicial notice would decree that the work of appellee Kiewit had been completed and had been accepted by the State.) Before the California Court of Appeal, appellants claimed to have stated a cause of action on three distinct theories: (1) Inverse Condemnation; (2) Nuisance; and (3) Negligence. The Court of Appeal ruled that the pleading failed to state a cause of action in inverse condemnation [JS A-2 to A-5], failed to state a cause of action for nuisance [JS A-5 to A-6], and that, "The complaint purported to allege negligence on the part of Peter Kiewit Sons' Co. in the construction of the freeway. This claim is not pressed on the appeal; it is therefore unnecessary to consider additional arguments of this defendant in support of the judgment in its favor." [JS A-6.] The remedy of negligence, which is allowable against a contractor in California, was thus waived or abandoned by appellants; they do not here claim that the ruling of the Court of Appeal as to claimed negligence is before this Court; the ruling there made is a matter of state, not federal, concern, particularly as to whether appellants had rendered unnecessary consideration of appellee Kiewit's arguments because of appellants' failure to press the same (negligence) on their appeal before that court. While appellants do not claim here that they have a right based solely on nuisance against appellee Kiewit, no such action lies against the contractor under the circumstances presented. (See, e.g., *Katcher v. Home Sav. & Loan Assn.* (1966), 245 Cal.App.2d 425, 53 Cal.Rptr. 923.)

Certainly, no provision of the United States Constitution proscribes California from so engaging appellee as such contractor in construction of the freeway.

Appellants bottom their appeal to this Court on a claim that they have been disallowed an action for *inverse condemnation* on the basis of California Civil Code, section 3482, enacted in 1872, and that this is in violation of the United States Constitution. The noted state statute provides:

> "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

This statute does not prevent a plaintiff, in a proper case, from seeking compensation through inverse condemnation proceedings pursuant to the self-executing provisions of the California Constitution. It concerns solely suits for damages for alleged nuisance—nothing more and nothing less. It does not preclude other remedies. By their own statements above quoted, appellants' claim before this court is in regard to their alleged action or right in inverse condemnation. Assuming that section 3482 is part and parcel of their claimed inverse condemnation action, as is implicit in their contention to this Court, the narrow question presented as it relates to appellee Kiewit is whether appellants have any such inverse condemnation rights against the contractor. No action or right in inverse condemnation exists against the contractor, here appellee Kiewit, under either Federal or State law and no such action is required to be allowed against the contractor under the United States Constitution.

ARGUMENT.

I.

Appellee Kiewit, the Contractor, Is Not Liable to Appellants for Inverse Condemnation.

As heretofore seen, appellants' claim before this Court is that they are entitled to redress in inverse condemnation—it being their claim that rights have been taken from them for public use without just compensation. If such be true, their remedy is in inverse condemnation against the governmental body. That remedy does not lie against the contractor.

In *Yearsley v. W. A. Ross Construction Co.* (1940), 309 U.S. 18, 84 L.ed. 554, 60 S.Ct. 413, the petitioners "alleged that the contract did not contemplate the taking of their land without just compensation and that the acts of the contractor resulted in the destruction of petitioners' property in violation of their rights under the Fifth Amendment of the Federal Constitution." The work was performed by the contractor under a contract with the United States Government. The trial court gave judgment for the petitioners which was reversed by the Circuit Court of Appeals. In affirming, the judgment of the appellate court, this Court held (309 U.S. at pp. 20-21):

> "In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. See Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How (US) 272, 283, 15 L ed 372, 377; Lamar v. Browne, 92 US 187, 199, 23 L ed 650 655; The Habana, 189 US 453, 465, 47 L ed 901, 903, 23 S Ct. 593. . . ."

It was pointed out (309 U.S. at p. 21) that, if there was a taking for which compensation was to be made under the Fifth Amendment of the Constitution, the remedy was against the Government, and, on pages 21-22, that, "It follows that as the Government in such a case promises just compensation and provides a complete remedy, action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred. The action of the agent is 'the act of the government.' United States v. Lynah, 188 US 445, 47 L ed 539, 23 S Ct 349, supra."

The California courts are in accord.

The California law is well summarized in *Asher v. Pacific Power and Light Co.* (1965), 249 F.Supp. 671, 676-677, where it was said:

> "The first cause of action is based on inverse condemnation and charges the 'defendants' with liability. An inverse condemnation action in California is based on article 1, section 14 of the California Constitution which provides that private property shall not be taken or damaged for public use without just compensation. Frustruck v. City of Fairfax, 212 Cal.App.2d 345, 28 Cal.Rptr. 357 (1963). Furthermore, the party to be held liable under this constitutional provision is the public agency authorizing the work which is the cause of the damage. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947). The liability which forms the basis for this cause of action is not grounded upon negligence but upon the above mentioned constitutional provision. Hume v. Fres-

no Irr. Dist., 21 Cal.App.2d 348, 69 P.2d 483 (1937). Thus the officers, agents and contractors of the public agency are not liable under this cause of action. Heimann v. City of Los Angeles, supra, Hume v. Fresno Irr. Dist., supra."

In *Anderson v. Fay Improvement Co.* (1955), 134 Cal.App.2d 738, 745-746, 286 P.2d 513, 518-519, it pertinently was said:

"The law is well settled that the contractors or subdividors could not be held liable for the damage in a direct or inverse condemnation suit. . . The reason for the rule is obvious. In case of damages in an inverse condemnation proceeding it is the public that has devoted the property to the public use, and the public and not the private contractor should pay for the damage. The damage to the right of access was, in effect, a taking by the government for a public use. . . The wrongful act entitling the plaintiffs to compensation was that of the city and county."

Appellee Kiewit does not mean to suggest that appellants here have stated any right in inverse condemnation against the State of California. In a proper case, appellants undoubtedly would have an action in inverse condemnation against the governmental body which has taken property for public use without compensation. California has provided such a remedy through the self-executing provisions of its Constitution. *Rose v. State of California* (1942), 19 Cal.2d 713, 123 P.2d 505. But no such action in inverse condemnation exists against the contractor engaged by the governmental body to perform the work of construction of the free-

way. The Constitution of the United States does not require that an action in inverse condemnation exist or be had as against the contractor. *Yearsley v. W. A. Ross Construction Co.; supra,* 309 U.S. 18. Insofar as concerns appellee Kiewit, no federal right has been shown to have been violated in regard to appellants.

As to appellee Kiewit, therefore, appellants' appeal should be dismissed or the judgment affirmed for the aforestated reasons.

II.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Revised Rules of This Court.

Rule 24 of the California Rules of Court provides, insofar as here material:

> ". . . A decision of a Court of Appeal becomes final as to that court 30 days after filing, . . . When a decision of a Court of Appeal is final as to said court, it is not subject to modification or rehearing by said court. . ."

Rule 27 of the California Rules of Court provides, insofar as here material:

> ". . . [A] Court of Appeal may grant a rehearing after its own decision in any cause . . . A rehearing may be granted on petition, . . . or on the court's own motion, prior to but not after the time the decision becomes final therein.
>
> ". . . A party seeking a rehearing . . . in the Court of Appeal . . . must serve and file a petition therefor within 15 days after the filing of the decision.

". . . If no order is made before the decision becomes final as provided in . . . Rule 24, the petition shall be denied, and the clerk shall enter a notation in the register to that effect."

Rule 28 of the California Rules of Court provides, insofar as here material:

"Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition . . ., may order the cause transferred to itself for hearing and decision, . . . A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, . . . The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. . ."

On page 2 of appellants' Jurisdictional Statement, it is said:

"The judgment sought to be reviewed is that of the California Court of Appeal. Said judgment was filed and entered on October 17, 1968. A timely Petition for Rehearing was duly filed on November 1, 1968, and was denied by the Court of Appeal on November 13, 1968. A timely Petition for Hearing was duly filed in the Supreme Court of California on November 22, 1968, and was denied on December 11, 1968. A Notice of Appeal to the Supreme Court of the United States was filed in the California Court of Appeal, Second Appellate District, on January 15, 1969."

Under the foregoing, the judgment of the Court of Appeal was not subject to modification or rehearing

by that court after the lapse of 30 days from October 17, 1968; it was final as to that Court. While the cause was subject to being transferred to the California Supreme Court during the following 30 days, the latter Court on December 11, 1968, denied appellants' petition for hearing. The time for appellate proceedings to this Court began to run as of the date of such denial, December 11, 1968. *Department of Banking v. Pink* (1942), 317 U.S. 264, 87 L.ed 254, 63 S.Ct. 233; *Monks v. Lee* (1942), 317 U.S. 590, 87 L.ed 483, 63 S.Ct. 50; *Market Street R. Co. v. Railroad Com. of Cal.* (1945), 324 U.S. 548, 89 L.ed 1171, 65 S.Ct. 770.

While appellants' notice of appeal to this Court was filed within ninety days of December 11, 1968, they did not docket their cause with this Court within said ninety-day period. So far as appellee Kiewit is aware, appellants did not seek or secure any extension from any Justice of this Court within which to docket the case. No such application was ever served upon counsel for appellee Kiewit.

Rule 13 of the Revised Rules of this Court, so far as here material, provides:

> "Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case . . . For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored."

Rule 34, paragraph 2, Revised Rules of this Court, provides in this regard: "Applications for extension of

time . . . to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period." (Paragraph 3 thereof requires that such an application "must be presented and served upon all parties as provided in Rule 50, . . .")

Appellants failed to docket their appeal within the ninety-day period from December 11, 1968, the date upon which the California Supreme Court denied appellants' Petition for Hearing and the date upon which, therefore, the judgment of the California Court of Appeal, theretofore rendered and entered, became final for appellate proceedings to this Court under the cited authorities.

Appellee Kiewit recognizes that probably a failure to docket within ninety days is not jurisdictional. *Johnson v. Florida* (1968), 391 U.S. 596, 20 L.ed 2d 838, 88 S.Ct. 1713. Nevertheless, the unexcused failure would appear to constitute a basis for dismissal of the appeal. *Pittsburgh Towing Co. v. Mississippi Barge Line* (1966), 385 U.S. 32, 17 L.ed. 2d 31, 87 S.Ct. 195. In accordance with letter dated March 19, 1969, from the Clerk of this Court (Xerox copy of which has been forwarded by counsel for Kiewit to counsel for appellants and to counsel for the State of California), appellee Kiewit has incorporated in this motion the untimeliness of the docketing. Appellee Kiewit submits that this Court should enforce the requirements of its Rules regulating the docketing of appeals to this Court. As held in *Pittsburgh Towing Co., supra,* 385 U.S. at page 32: "This Court has been generous in excusing errors of counsel, but if there are to be rules, there

must be some limit to our willingness to overlook their violation."

Appellants had ample time to have docketed their appeal within the prescribed period. They did not do so. If it was necessary to have additional time, they could have applied therefor. They did not do so. Unless the Rules of this Court be enforced, the same become meaningless and ineffective—promotive of dilatory practices—contrary to the express provisions and intent of the Rules.

Appellants' failure to docket their appeal within the prescribed time is submitted to constitute an additional, albeit less conclusive, reason for dismissal to the reasons expressed in Point I of this motion.

Conclusion.

For the foregoing reasons and each of them, it is respectfully submitted and prayed that, as to Appellee, Peter Kiewit Sons' Co., a corporation, the appeal be dismissed or the judgment be affirmed.

Dated: March 26, 1969.

HENRY F. WALKER,
WAYNE VEATCH,
ROBERT C. CARLSON,
ROBERT P. DORSEY,
and
FREDERICK C. QUIMBY, JR.,
Counsel for Appellee, Peter Kiewit Sons' Co., a corporation.